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No. 772

In the

Supreme Court of the United States

October Term 1966

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

REPLY MEMORANDUM FOR PETITIONERS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BILL BRICE,
RAY BESING,
RAY PEARCE,
GEARY, BRICE & LEWIS,
2500 LTV Tower,
Dallas, Texas 75201,
Counsel for Petitioners.

WILLIAM VANDERCREEK,
3315 Daniels,
Dallas, Texas 75205,
Of Counsel.

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REPLY

Respondent A T & T's contention that the instant cause merely concerns a "discretionary" denial of a preliminary injunction is not correct for the following reasons:

(a) The Trial Court denied a *hearing* on the Motion for Preliminary injunction (R. 161-162) and, unless the Court's Order of February 8 (R. 148-156) referring the damage cause is both correct and controlling, this action constitutes an abuse of discretion as a matter of law.

See, *e.g.*, *Hawkins v. Board of Control*, 253 F. 2d 752 (5th Cir. 1958) at 753:

> "Rule 65(b), F.R.C.P., 28 U.S.C.A., requires that a motion for a preliminary injunction 'shall be set * * * for hearing * * *.' Hearing requires a trial of an issue of fact. Trial of an issue of fact necessitates an opportunity to present evidence. Sims v. Greene, 3 Cir. 161 F. 2d 87. Since appellant was not given the opportunity to present evidence in his behalf, the order denying the preliminary injunction must be set aside."*;

(b) In denying preliminary injunctions, Rule 52(a) provides the trial court "*shall* * * * set forth findings of facts and conclusions of law * * *" Here the trial court expressly predicated its denial of a preliminary injunction on its order of February 8 which referred the damage cause. The appeal from the denial of the preliminary injunction thus necessarily brings forth the merits of such order. (Since no hearing was held on the injunction and the February 8 order was heard only upon legal arguments pertaining to Respondents Motions to Dismiss, all *fact* issues should be resolved in Petitioner's favor.);

(c) The Court of Appeals' opinion below was based squarely upon the legal issue concerning primary jurisdiction and not upon any discretionary injunction concept.

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* Rule 65(a)(2) as amended in 1966 provides in part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be *advanced* and consolidated with the hearing of the application." (Emphasis added.) Here, under the doctrine of primary jurisdiction the trial on the merits was ordered *delayed* until after agency determination—a probable delay of several *years*. See Petition for Certiorari, p. 15.

The central question in this case is whether the trial court correctly invoked the doctrine of primary jurisdiction. In all cases involving primary jurisdiction (and not exclusive jurisdiction), the trial court will retain jurisdiction, and not dismiss, pending the administrative referral. Here, Petitioners not only appealed under the preliminary injunction provision, 28 U.S.C. §1292(a), R. 167, but also under the collateral order doctrine gave notice of appeal from the February 8 order, R. 169; and sought (unsuccessfully) a discretionary appeal from the trial court under §1292(b), R. 163-164, 166. In addition, they filed a Petition for Mandamus in the Court of Appeals.

If this case does not squarely raise the primary jurisdiction issue, there is no way to raise it in time for *effective* review.

By analogy, Congress, where the government is a party, favors Supreme Court review of antitrust and communication cases by providing a direct appeal from the trial court to this Court. 15 U.S.C. §29; 49 U.S.C. §45. *If the Respondent's arguments were correct, no such appeal would lie in primary jurisdiction cases.*

A T & T's Opposition to Certiorari is predicated upon the unsound premise of discretionary denial of an injunction; A T & T advances no valid reasons for denial of Certiorari as to the primary jurisdiction issue that is presented by the case at bar. Perhaps it should be emphasized that the case at bar involves economic competitive coercion within the competency of the courts and not problems of administrative expertise. In essence, the problem here would be the same

if various power companies combined to cut off the electricity of any consumer who did not use their brand of electric stoves. In the case at bar, the Respondents did not choose to meet competition by better services and lower charges; they chose instead to crush their competitor. Having done so, the Respondents now wish to place their actions under the protective mantle of primary jurisdiction. If they are able to sustain that position, then, even though the Petitioners should prevail in the F.C.C., the Respondents would have effectively prevailed in the antitrust suit because of the delay and because the agency hearing will not resolve any decisive issues to the antitrust suit.

Whether primary jurisdiction should be automatically invoked in antitrust suits involving regulated industries is a matter of sufficient national importance to be heard by this Court.

Respectfully submitted,

BILL BRICE,
RAY BESING,
RAY PEARCE,
GEARY, BRICE & LEWIS,
2500 LTV Tower,
Dallas, Texas 75201,
Counsel for Petitioners.

By: .....
William VanDercreek

WILLIAM VANDERCREEK,
3315 Daniels,
Dallas, Texas 75205,
Of Counsel.